

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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6 SOUTHERN DISTRICT OF CALIFORNIA
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14 SOUTHERN DISTRICT OF CALIFORNIA
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16 **UNITED STATES BANKRUPTCY COURT**

17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 In re:) BANKRUPTCY CASE NO. 02-09721-H7
19)
20 COMMERCIAL MONEY CENTER,) ADVERSARY NO. 04-90191-H7
21 INC.,)
22) MEMORANDUM DECISION
23 Debtor.)
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1 Richard M. Kipperman, Chapter 7 trustee (the "trustee"),
2 moved to compel defendant to answer questions regarding
3 defendant's tax returns and requested sanctions under Federal
4 Rule Civil Procedure ("FRCP") 37(a)(4)(A).

5 After considering the pleadings and hearing oral argument,

57

1 the Court granted the trustee's motion and took the issue of
2 sanctions under submission.

3 This Court has jurisdiction to determine this matter
4 pursuant to 28 U.S.C. §§ 1334 and 157(b) (1) and General Order
5 No. 312-D of the United States District Court for the Southern
6 District of California. This is a core proceeding pursuant to
7 28 U.S.C. § 157(b) (2) (A) .

8 I.

9 FACTS

10 The trustee filed a complaint against defendant alleging
11 claims for relief under 11 U.S.C. §§ 544(b), 547, 548 and 550.¹
12 On August 10, 2005, trustee's counsel, Jesse S. Finlayson
13 ("Finlayson") took defendant's deposition. Defendant refused to
14 answer any questions regarding his tax returns on the grounds
15 that the returns, and their contents, were privileged under
16 California law.

17 In the Fall 2005, defendant's counsel, Howard F. Burns
18 ("Burns") had some communication with trustee's counsel, Michael
19 R. Williams ("Williams"), regarding the discovery dispute.
20 Several months later, Finlayson initiated a formal meet and
21 confer with Burns by letter on March 17, 2006, in accordance with
22 Local Bankruptcy Rule ("LBR") 7026-2. After an email exchange,
23 counsel spoke by telephone on March 24, 2006. Subsequently,
24 emails were exchanged until April 8, 2006. The meet and confer
25 did not result in a resolution.

26 The trustee moved to compel defendant's testimony on the
27 ground that the tax returns were not privileged under federal
28

¹ The trustee later moved to file a first amended complaint to add claims for relief for actual fraud.

1 privilege law. Finlayson also alleges that Burns did not meet
2 and confer in good faith. The trustee seeks \$7,267 in attorney
3 fees as a sanction against defendant because his refusal to
4 answer questions regarding his tax returns was not "substantially
5 justified."

6 Defendant opposed the trustee's motion to compel on several
7 grounds, including inter alia, that the information sought was
8 not relevant to his good faith defense and California privilege
9 law should apply. Defendant cites Pagano v. Oroville Hosp., 145
10 F.R.D. 683, 695 (E.D. Cal. 1993), which held that pendent state
11 law claims are governed by federal privilege law, but state law
12 should be applied where provisions of state privilege can be
13 harmonized with federal discovery law. In other words, in a case
14 where there are both federal and state claims, a federal court
15 may, under certain circumstances, apply state privilege law in
16 the interests of comity. Defendant also requested attorney fees
17 against the trustee in the amount of \$3,575 contending that the
18 trustee's motion was not "substantially justified."

19 In reply, the trustee pointed out that after defendant
20 initially claimed his tax returns privileged under California
21 law, he now claims he should not be required to answer because
22 the information is irrelevant. The trustee contends that it
23 would be improper for defendant to assert a relevance objection
24 at the deposition and he should not be able to assert that
25 objection now. Further, the information is highly relevant to
26 the defendant's good faith defense and as impeachment evidence.
27 Finally, the trustee contends that Pagano is no longer valid law
28 in light of the Supreme Court's ruling in Jaffee v. Redmond, 116

1 S.Ct. 1932 (1996).²

2 For the reasons set forth below, the Court will grant the
3 trustee's request for sanctions.

4 II.

5 DISCUSSION

6 A. THE MEET AND CONFER

7 Local Bankruptcy Rule 7026-2 provides:

8 The court shall entertain no motion pursuant
9 to Fed. R. Bankr. P. 7026 through 7037 unless
10 counsel shall have previously met and
11 conferred by telephone or in person
12 concerning all disputed discovery issues....
13 If counsel for the moving party seeks to
14 arrange such a conference and counsel for the
15 non-moving party willfully refuses or fails
16 to meet and confer,...the judge may order the
17 payment of reasonable expenses, including
18 attorney fees, pursuant to Fed. R. Bankr. P.
19 7037.

15 The local rule contemplates that counsel will make
16 reasonable efforts to work together to resolve discovery
17 disputes. Moreover, the duty prescribed by LBR 7026-2 is a
18 professional obligation which counsel owe to this Court. As
19 such, inherent in the meet and confer process is a good faith
20 requirement for both the moving and non-moving party. In
21 referring to a local rule that is similar to the one in this
22

23 ² Specifically, in Folb v. Motion Picture Ind. Pension and Health Plans,
24 16 F.Supp.2d 1164 (C.D. Cal. 1998), the court held that federal privilege
25 governs both federal and pendent state law claims in federal questions cases,
26 and a federal court should not look to the law of the forum state as a matter
27 of comity. In Folb, the magistrate judge had denied the plaintiff's motion to
28 compel production of a mediation brief finding that California's mediation
privilege applied in the case as a matter of comity because it is consistent
with federal interests. The district court found that the magistrate judge
had erred as a matter of law when applying the California privilege as a
matter of comity. The district court noted that to the extent the magistrate
relied on authority (such as Pagano), that authority is disapproved by Jaffee.
Id. at 1170. In Jackson v. County of Sacramento, 175 F.R.D. 653, 654 (E.D.
Cal. 1997), the court also noted that Pagano was overruled by Jaffee.

1 district, one court noted "[t]he purpose of the rule is simple:
2 to lessen the burden on the court and reduce the unnecessary
3 expenditure of resources by litigants, through promotion of
4 informal, extrajudicial resolution of discovery disputes."
5 Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 119 (D. Nev.
6 1993).

7 The declarations submitted by Finlayson and attached
8 correspondence demonstrates to this Court, that the trustee, as
9 moving party, complied with the meet and confer requirements
10 under LBR 7026-2 and FRCP 37(a)(2)(B).³ Finlayson alleges that
11 Burns did not meet and confer in good faith.

12 The initial email sent from Burns to Williams in the Fall of
13 2005 set forth the legal authority Burns relied upon that the
14 requested tax returns were privileged under California law.
15 Citing Davis v. Leal, 43 F. Supp. 2d 1102 (E.D. Cal. 1999), Burns
16 claimed that California privilege law applied to the adversary
17 proceeding since the trustee was proceeding to set aside a
18 fraudulent transfer under California law.⁴ Months later, during
19 the telephonic meet and confer on March 24, 2006, Finlayson
20 explained his position regarding applicable privilege law and
21

22 ³ When filing a motion to compel, the moving party must "include a
23 certification that the movant has in good faith conferred or attempted to
24 confer with the person or party failing to make discovery in an effort to
secure the information or material without court action." FRCP 37(a)(2)(B).

25 ⁴ In Davis v. Leal, the FDIC and receiver moved to compel from defendant
26 Leal discovery including tax return information and general business records.
27 Leal asserted various privileges under state law. Thus, at issue was whether
28 federal or state privilege law would apply. To resolve the discovery dispute,
the court had to analyze whether state or federal law would supply the rule of
decision in the action. The court found that the FDIC alleged only state law
claims and, therefore, state law would supply the rule of decision for all
claims. Id. at 1108. "Having determined that state law will supply the rule
of decision, it follows that assertions of privilege will be governed by state
law." Id.

1 offered protective measures to ensure defendant's privacy. Burns
2 wanted time to review Finlayson's authorities, so Finlayson gave
3 Burns until March 27, 2006, to respond. After getting no
4 response, Finlayson contacted Burns to let him know of the
5 scheduled date for the motion to compel.

6 On April 3, 2006, Burns responded that he would review the
7 authorities and respond to Finlayson by April 5, 2006. On that
8 date, Burns indicated that he reviewed the authorities and it was
9 still his opinion that the tax returns could not be discovered.
10 Burns provided no analysis regarding Finlayson's authorities. On
11 the same day, Finlayson sent an email back to Burns requesting
12 that Burns provide some explanation why the authorities cited by
13 Finlayson did not support the trustee's position. On April 6,
14 2006, Burns responded that after the March 24, 2006, telephone
15 conference, he "thought that we had agreed to disagree over the
16 question." He further stated that "I don't understand why you
17 need for me to put in writing what we discussed over forty
18 minutes during our March 24 conversation." He concluded "I have
19 read the authority that you cited, which echoed the authority
20 that I had read before our call, and it did not change my mind."
21 Finlayson responded on April 8, 2006, expressing his frustration
22 that Burns was unwilling to explain his analysis.

23 One court has interpreted the meaning of good faith in the
24 context of FRCP 37(a)(2)(B): "'Good faith' under 37(a)(2)(B)
25 contemplates, among other things, honesty in one's purpose to
26 meaningfully discuss the discovery dispute, freedom from
27 intention to defraud or abuse the discovery process, and
28 faithfulness to one's obligation to secure information without

1 court action." Shuffle Master, Inc. v. Progressive Games, Inc.,
2 170 F.R.D. 166, 171 (D. Nev. 1996) (citation omitted). "'Good
3 faith' is tested by the court according to the nature of the
4 dispute, the reasonableness of the positions held by the
5 respective parties, and the means by which both sides conferred."
6 Id. "'Conferring' under Rule 37(a)(2)(B) must be a personal or
7 telephonic consultation during which the parties engage in
8 meaningful negotiations or otherwise provide legal support for
9 their position." Id. at 172.

10 [T]he parties must present to each other the
11 merits of their respective positions with the
12 same candor, specificity, and support during
13 informal negotiations as during the briefing
14 of discovery motions. Only after all the
15 cards have been laid on the table, and a
16 party has meaningfully assessed the relative
17 strengths and weaknesses of its position in
18 light of all available information, can there
19 be a "sincere effort" to resolve the matter.
20 Further, to ensure that the parties have made
every effort to reach a "satisfactory
resolution," judicial intervention should be
considered appropriate only when 1) informal
negotiations have reached an impasse on the
substantive issue in dispute, or 2) one party
has acted in bad faith, either by refusing to
engage in negotiations altogether or by
refusing to provide specific support for its
claims of privilege.

21 Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 120 (D. Nev.
22 1993) (discussing local district court rule that required meet
23 and confer requirement for discovery dispute) (citation omitted).

24 The Court has reviewed the various correspondence provided
25 by the trustee and concludes that Burns failed to engage in any
26 meaningful negotiations or otherwise provide legal support for
27 his position during the meet and confer. His initial authorities
28 provided to attorney Williams, simply reiterated that under

1 California law, tax returns are privileged. His citation to
2 Davis v. Lael also does not support his argument that this Court
3 should apply California privilege law in this adversary
4 proceeding. In Lael, only state law claims were alleged and no
5 federal claims were implicated as they are in this adversary.
6 Further, the authority cited to Williams was not the authority
7 Burns relied upon in his brief opposing the trustee's motion. At
8 no time during the meet and confer did Burns mention the Pagano
9 case to either Williams or Finlayson.

10 In sum, Burns did not present the merits of his position to
11 the trustee's counsel with the same candor, specificity and
12 support as he did in his brief. He did not, as the court in
13 Nevada Power Co. v. Monsanto Co. prescribed, lay out all the
14 cards on the table. Not only did he withhold the case law that
15 he principally relied upon in his written opposition, he failed
16 to provide trustee's counsel with any analysis whatsoever
17 regarding the weaknesses, if any, in the trustee's authorities.

18 In Burns' declaration, he contends that he does not believe
19 that the trustee's counsel made a good faith effort to meet and
20 confer because he "failed to adequately address the principal
21 issue in this motion, namely how the contents of Mr. Quiroz' tax
22 returns are relevant to the alleged fraudulent transfers between
23 CMC and Mr. Quiroz." [Decl. of Howard F. Burns, 2:18-21]. Burns
24 declares that he asked trustee's counsel on several occasions
25 during the telephone conference how the tax returns were
26 relevant. [Id. at 2:24-25]. Burns also declares that he "did
27 agree to review some authorities that Mr. Finlayson cited . . .
28 but those authorities pertained only to the tax return privilege

1 and said nothing pertaining to my relevance objection." [Id. at
2 3:12-14]. Burns declares that he made the relevance objection
3 "during my conversation with Mr. Finlayson on March 24, 2006,"
4 but then acknowledges that he "did not make a relevance objection
5 at the deposition since such objections are disfavored at a
6 deposition and because relevance is not a ground for directing a
7 client not to answer." [Id. at 16-18].

8 Burns clearly recognizes that a party may instruct a
9 deposition witness not to answer when necessary to preserve a
10 privilege, FRCP 30(d)(1), but that it is inappropriate to
11 instruct a witness not to answer a question on the basis of
12 relevance. Nonetheless, after claiming the tax returns were
13 privileged, he then shifted his position and attempted to focus
14 the issue on one of relevance.

15 Burns' declaration, which contains the legal argument for
16 asserting that Finlayson did not meet and confer in good faith,
17 provides further support of Burns' failure to meaningful
18 participate in the meet and confer. One aspect of good faith is
19 the reasonableness of the positions held by the respective
20 parties. Shuffle Master, Inc., 170 F.R.D. at 171. It was
21 unreasonable for Burns to take the position that the tax returns
22 were privileged under California law and that California
23 privilege law applied to this adversary, and then later claim in
24 the meet and confer that the tax returns were not relevant while
25 at the same time acknowledging that relevancy is not a proper
26 ground for instructing a witness not to answer.⁵

27
28 ⁵ The Court addressed the relevancy of the tax returns at the hearing on
this matter and found them relevant to defendant's good faith defense and for
impeachment purposes.

1 The Court finds that Burns did not engage in any meaningful
2 negotiations or make reasonable efforts to resolve the discovery
3 dispute nor does the record support a finding that he ever was
4 acting in good faith. Sanctions are therefore appropriate.

5 B. SANCTIONS UNDER RULE 37(a)(4)(A): PAGANO AND
6 SUBSTANTIAL JUSTIFICATION

7 Federal Rule Bankruptcy Procedure 7037 makes FRCP 37
8 applicable in adversary proceedings. Federal Rule Civil
9 Procedure 37(a)(4)(A) provides that if a motion to compel
10 discovery is granted

11 the court shall, after affording an
12 opportunity to be heard, require the party or
13 deponent whose conduct necessitated the
14 motion or the party or attorney advising such
15 conduct or both of them to pay to the moving
16 party the reasonable expenses incurred in
17 making the motion, including attorney's fees,
18 unless the court finds the motion was filed
19 without the movant's first making a good
20 faith effort to obtain the disclosure or
21 discovery without court action, or that the
22 opposing party's ... objection was
23 substantially justified....

24 "The great operative principle of Rule 37(a)(4) is that the
25 loser pays. Fee shifting when the judge must rule on discovery
26 disputes encourages their voluntary resolution and curtails the
27 ability of litigants to use legal processes to heap detriments on
28 adversaries (or third parties) without regard to the merits of
the claims." Rickels v. City of South Bend, Indiana, 33 F.3d 785
(7th Cir. 1994) (citation omitted). The principle that the
"loser pays" is presumptive rather than automatic, because Rule
37(a)(4) provides an exception where the losing party can avoid
assessment of fees and expenses if its opposition to the motion
to compel was substantially justified.

1 "A request for discovery is 'substantially justified' under
2 the rule if reasonable people could differ as to whether the
3 party requested must comply." Reygo Pacific Corp. v. Johnston
4 Pump Co., 680 F.2d 647, 648 (9th Cir. 1982) (citation omitted);
5 See also Pierce v. Underwood, 487 U.S. 552, 564-65, 108 S.Ct.
6 2541, 2549-50 (1988) (finding substantially justified means
7 justified to a degree that could satisfy a reasonable person).
8 "When a dispute involves differing interpretations of governing
9 law, opposition is substantially justified unless it involves an
10 unreasonable, frivolous or completely unsupportable reading of
11 the law." Bowne of New York City, Inc. v. AmBase Corp., 161
12 F.R.D. 258, 265 (S.D.N.Y. 1995) (citations omitted). "Such a
13 lenient standard is necessary given the fact that attorneys must
14 advocate for their clients, and they must be allowed to address
15 areas of the law that have not been fully elucidated by the
16 courts." Id.

17 "[A] motion for sanctions under Rule 37, even one which
18 names only a party, places both that party and its attorney on
19 notice that the court may assess sanctions against either or both
20 unless they provide the court with a substantial justification
21 for their conduct." Devaney v. Continental Amer. Ins. Co., 989
22 F.2d 1154, 1159 (11th Cir. 1993) (noting that "a party listing
23 only its opponent in a motion for sanctions does not absolve the
24 opponent's attorney of potential liability.").

25 Both sides agree that state and federal fraudulent transfer
26 law are implicated in the trustee's adversary proceeding against
27 defendant. The next question is what privilege law this Court
28 should apply.

1 "Federal Rule Evidence 501 governs any claim of privilege in
2 a case proceeding in the federal courts." Platypus Wear, Inc. v.
3 K.D. Co., Inc., 905 F.Supp. 808, 810 (S.D. Cal. 1995). Federal
4 Rule Evidence 501 makes clear that in federal question cases, the
5 federal common law of privilege applies and where state law
6 provides the rule of decision, state privilege law will govern.
7 But this adversary involves both federal question claims and
8 pendent state claims so it does not fit neatly in either
9 category. The Platypus stated that the "Ninth Circuit has not
10 addressed the issue of what privilege law should be applied in
11 cases involving both state and federal claims." Id. at 810.
12 Nonetheless, the Platypus court recognized that the "need for
13 consistency requires federal courts to apply federal privilege
14 policies, rather than state privilege law, where evidence goes to
15 both federal and state law claims." Id. at 811-12.

16 Besides Platypus, the trustee also cited Wm. T. Thompson Co.
17 v. Gen. Nutrition Corp., 671 F.2d 100 (3d Cir. 1982) in support
18 of his position that when there are federal law claims in a case
19 also presenting state law claims, the federal rule favoring
20 admissibility, rather than state law privilege is the controlling
21 rule. In Thompson, the state law claims overlapped the federal
22 claims so that the same evidence would be necessary as to all
23 issues. The court found that application of both state and
24 federal law to the same evidence would be unworkable. Id. at
25 103.

26 Burns recognizes that in federal questions cases, or such
27 cases with pendent state claims, the general rule is that federal
28 privilege law applies. Burns argues, however, that this is not

1 the end of the analysis and cites Pagano, 145 F.R.D. at 683 in
2 support. Burns contends that Pagano stands for the proposition
3 that the strong policy of comity between state and federal
4 sovereignties impels this Court to recognize state law privileges
5 even in federal question cases where this can be accomplished at
6 no substantial costs to federal substantive and procedural
7 policy. According to Burns, as long as there is no inconsistency
8 between the state law privilege and federal privilege law, the
9 two should be read together in order to accommodate the
10 legitimate expectations of the state's citizens. Id. at 688.
11 Burns maintains that several courts, including the Ninth Circuit,
12 have extended some protection against disclosure of tax returns.
13 In contrast, the state courts have also qualified the privilege
14 under state law so it is not absolute. Thus, he concludes that
15 because the disclosure of tax returns under federal law is
16 qualified, as is the privilege against disclosure under
17 California law, there is no inconsistency.

18 Assuming, but not deciding, that Pagano is still good law on
19 the issue of comity,⁶ considerations of comity would not require
20 this Court to adopt the California privilege for tax returns for
21 several reasons. First, embracing state privilege law is
22 inappropriate when the Ninth Circuit has explicitly rejected a
23 federal privilege for tax returns. Heathman v. U.S.D.C., 503
24 F.2d 1032 (9th Cir. 1974); see also Young v. U.S., 149 F.R.D.
25 199, 201 (S.D. Cal. 1993) ("Under federal law, tax returns are
26

27 ⁶ There was much discussion at the hearing on this matter whether Pagano
28 was subsequently overruled by Jaffee v. Redmond, 116 S.Ct. 1932 (1996). This
Court need not conclusively decide that Jaffee overruled Pagano to determine
whether defendant's objection to the trustee's motion was substantially
justified.

1 generally discoverable where necessary in private civil
2 litigation.") (citation omitted). Even under Pagano, the court
3 went on to explain that state privilege law should not apply
4 "[w]hen there is a clear inconsistency - for example, the state
5 privilege is absolute in its application while the federal
6 privilege is qualified, or the federal courts have explicitly
7 rejected a federal privilege analogous to an asserted state
8 privilege - state privilege law should not apply." 145 F.R.D. at
9 687.

10 Next, the trustee's claims for relief for fraudulent
11 transfers under 11 U.S.C. §§ 544 and 548 require most, if not
12 all, of the same evidence. Where evidence goes to both federal
13 and state law claims, the "need for consistency requires federal
14 courts to apply federal privilege policies, rather than state
15 privilege law. Platypus, 905 F.Supp. at 811 - 812. One court
16 further explained

17 Where a document is relevant to both federal
18 and state claims but the federal and state
19 privilege rules are inconsistent, the
20 application of an inconsistent state rule in
21 either direction could undermine the federal
22 evidentiary interest -- either by barring
23 disclosure of a document that federal law
24 permits a party to see, or by requiring the
25 disclosure of a document that federal law
26 protects from prying eyes. At least with
27 respect to discovery, "it would be
28 meaningless to hold the communication
privileged for one set of claims and not for
the other."

25 In re Sealed Case (Medical Records), 381 F.3d 1205, 1212 (D.C.
26 2004) (citation omitted); see also Platypus, 905 F.Supp. at 811-12
27 (court noted that it would not be forced to apply two different
28 privilege rules to the same evidence and, therefore, state

1 privilege law would apply to state causes of action).

2 The Court finds that defendant's assertion of privilege for
3 his tax returns was not substantially justified. Burns' citation
4 to Pagano does not support the application of comity in this case
5 especially in light of the fact that the majority of federal
6 courts hold federal privilege law applies when the evidence
7 sought is relevant to both the federal and state claims. See
8 generally In re Sealed Case, 381 F.3d at 1212 n.7.

9 Finlayson further pointed out that had Burns cited Pagano
10 during the meet and confer, he could have discussed the
11 weaknesses in the case, i.e., that even under Pagano if there's
12 binding authority from the Ninth Circuit or the Supreme Court
13 rejecting a specific privilege, it cannot be recognized under the
14 concept of comity. "But that's the part of the analysis that
15 never took place." [Transcript 14-19].

16 The Court finds that reasonable people could not differ as
17 to whether or not the tax returns were privileged in this mixed
18 federal and state claim fraudulent transfer action. The Court
19 recognizes that attorneys must advocate for their clients and
20 they must be allowed to address areas of the law that have not
21 been fully elucidated by the courts. However, this is an area of
22 the law that has been fully elucidated. Had Burns taken the time
23 and initiative to thoroughly review the trustee's authorities and
24 share his own analysis with respect to Pagano, it is unlikely
25 that this dispute would have ended up before the Court.

26 The Court will award sanctions only against Burns since
27 there is no evidence that the defendant had any involvement in
28 the meet or confer or was involved in any respect other than to

1 take his attorney's advice. See Devaney v. Continental Amer.
2 Ins. Co., 989 F.2d at 1159.

3 C. Amount of the Sanction

4 "When the sanctions award is based upon attorney's fees and
5 related expenses, an essential part of determining the
6 reasonableness of the award is inquiring into the reasonableness
7 of the claimed fees." In re Yagman, 796 F.2d 1165, 1184 (9th Cir.
8 1986). "[T]he court must make some evaluation of the fee
9 breakdown submitted by counsel." Id. (citation omitted). The
10 court should consider "'not actual expenses and fees but those
11 the court determines to be reasonable.'" Id. at 1185 (citation
12 omitted).

13 Trustee's counsel has requested his fees and those of the
14 trustee's accountants. There have been no time records submitted
15 in support of his request and, therefore, the Court cannot
16 determine whether the amounts requested are reasonable. The
17 trustee may submit the time records to the Court with any
18 response within fourteen days thereafter.

19
20 III.

21 CONCLUSION

22 The Court finds that Burns did not engage in a meaningful
23 meet and confer which is required under LBR 7026-2 nor was his
24 objection to the line of questioning regarding the defendant's
25 tax returns substantially justified under existing case law.
26 Sanctions are therefore appropriate under LBR 7026-2 and FRBP
27 7037(a) (4) (A).

28 This Memorandum Decision constitutes findings of fact and

1 conclusions of law pursuant to Federal Rule of Bankruptcy
2 Procedure 7052. The trustee is directed to file with this Court
3 an order in conformance with this Memorandum Decision within ten
4 (10) days from the date of entry hereof.

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6 Dated: June 29, 2006


7 JOHN J. HARGROVE
8 United States Bankruptcy Judge
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991**

In re:

Bankruptcy Case No. 02-09721-H7 [Jointly Administered with Case No. 02-09720-H7]

Adversary Proceeding Case No: 04-90191-H7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

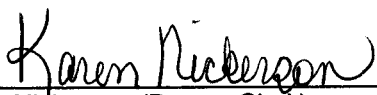
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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on June 29, 2006.



Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove